In my opinion, this, and other similar pronouncements by Indian Courts, are incompatible with the provisions of Section 315 of the Colony Code which puts upon the appellant, in an appeal on a question of fact, the onus of satisfying the Appellate Court that the judgment was against the weight of evidence.

It is to be noted that when Burton J. stated in his own words the principle upon which an Appellate Court in the Colony should act he used more restricted terms than the Indian Court whose judgment he had just cited.

I do not think the other local cases to which I was referred state any fresh principle: they are only examples of the application of recognized principles. I am not now trying to restate those principles but am merely giving a caution against reliance on Indian cases which are not applicable to the law of the Colony.

There is one other point to which I should refer. I agree with the appellant's contention that where the judgment depends upon inferences drawn from proved facts the Appellate Court is as competent to draw those inferences as the trial Court; but nevertheless, in my opinion, section 315 requires that the Appellate Court should not refuse to accept an inference drawn by the Magistrate if it appears to be fair and reasonable even though the Appellate Court might not have itself drawn that inference. An inference which is fair and reasonable cannot, I think, be said to be against the weight of evidence.

In this case the grounds of appeal are many and long, but, in effect, amount to this: that at the conclusion of the case for the Prosecution no case against the accused had been made out which if unrebutted would warrant his conviction, and that although the trial Magistrate called upon the accused for his defence there was nothing in the evidence called for the defence which strengthened the case for the prosecution, but on the contrary the evidence was such that the Magistrate ought to have entertained a reasonable doubt of the accused's guilt and have acquitted him.

[His Lordship next reviewed the evidence in the case and decided that on the facts of the case he was not prepared to hold that the inferences drawn by the learned Magistrate from them were unreasonable or that the finding was against the weight of the evidence. He then proceeded as follows:—]

There is one point of procedure to which I wish to draw attention.

The prosecution sought to cross-examine witnesses on statements made to the Police under the provisions of Section 124 of the Criminal Procedure Code. The statements in question were handed to the Magistrate who, after looking at them, rejected the application, but nevertheless marked the statements as exhibits and they appear as part of the record.

If an application under Section 124 (2) is not allowed the statement is not in evidence at all and should not be marked or form part of the record.

As a matter of practice it is advisable for the prosecuting officer to mark the passage or passsages in the statement which he considers inconsistent with the evidence before he hands the statement to the Magistrate. This ensures that the attention of the Court is drawn to the relevant passage and only the portion allowed by the Magistrate need be put to the witness. If the witness admits making the contradictory statement there is, of course, no need for a copy of the written statement to be put in evidence, but if there is no such admission, the written statement must be formally proved.

Appeal dismissed.

Re O. K. VARGHESE & COMPANY.

[Orig. Civil Juris. (McElwaine, C.J.) Nov. 10, 1941]

Bankruptcy—Service of Bankruptcy Petition upon respondent who carries on business in name of "Company" and who is a sole proprietor of the business—Whether mere closing down a place of business constitutes an act of bankruptcy.

Closing a place of business is not an act of bankruptcy unless the closing is done to defeat or delay creditors; and the Petition must allege this.

Where the respondent to a Bankruptcy Petition carried on business under e.g. the name "O.K.V. & Company," his own name being "O.K.V." and he himself being the sole proprietor of the business, he must be personally served with the Bankruptcy Petition, at any rate, in the absence of any active misrepresentation which might raise an estoppel against him.

Cases Referred to—

(1) *Re the Debtors* (No. 21 of 1912) 107 L.T.R. 624.

(2) *Re a Judgment Debtor* (No. 1539 of 1936) 1937 1 Ch. 137.

BANKRUPTCY MOTION.

A. de Mello for applicant.

S. B. Aditan for Petitioning Creditor.

The facts and arguments sufficiently appear from the Judgment.

Cur. adv. vult.

McElwaine, C.J.—This is a motion on behalf of O. K. Varghese, proprietor of the business known as O. K. Varghese & Co., that the Bankruptcy Petition herein dated the 21st day of October 1940 and all subsequent proceedings founded thereon, be set aside, and that the Receiving Order made herein the 8th day of November 1940 be rescinded, and the Adjudication Order made herein the 29th day of November 1940 be annulled, with costs to be paid by the Petitioning creditor to the applicant.

The petition alleged two acts of bankruptcy:

1. That they closed their place of business at No. 58 Serangoon Road, Singapore;
2. That they have suspended payment of their debts

If closing one's place of business is an act of bankruptcy almost every business in Singapore commits an act of bankruptcy daily. Closing a place of business is not an act of bankruptcy unless the closing is done to delay or defeat creditors, and the petition does not allege this.

As to the second act of bankruptcy, Aitken J. has already expressed strong doubts whether there was any such suspension of payment as would constitute an act of bankruptcy.

Both these acts of bankruptcy are alleged to have taken place on the 19th October 1940, yet the bankruptcy petition is alleged to have been served on the 22nd October 1940 on T. Murugaiya "as the person having the control or management of the business of the said O. K. Varghese & Co." and the service was alleged to have been effected at the very place, 58 Serangoon Road, which was alleged to have closed four days earlier.

O. K. Varghese had left on a visit to India, his birth place, on 15th October. He is the sole proprietor of O. K. Varghese & Co.

The motion sets out five reasons why it should be granted. An inquiry into some of the allegations set out in the motion would involve a substantial amount of cross-examination and I was informed that the hearing of the motion would take three days.

I therefore decided to hear argument on the first ground only because, if that were decided in favour of the applicant, it would be quite unnecessary to go into the other grounds, which could be considered if I decided against the applicant on the first ground.

The first ground was that the petition was not duly served.

O. K. Varghese & Co. is not a partnership but the name and style under which O. K. Varghese, the sole proprietor of the business, carries on his business.

Bankruptcy Rule 109 provides that a creditor's petition shall be personally served by delivering to the debtor a sealed copy of the filed petition. This was not done, nor was any order for substituted service made. The petitioning creditor relied on Bankruptcy Rule 219 which reads:—

> "Any notice or petition for which personal service is necessary shall be deemed to be duly served on all the members of a firm if it is served at the principal place of business of the firm in the Colony on any one of the partners or upon any person having at the time of service the control or management of the partnership business there."

In *Re the Debtors*[1] it was decided that the English Rule 260, which corresponds to the Colony Rule 219, does not apply to a single person trading under a firm name. Phillimore J. said "A single individual trading under a firm or partnership name is not a 'firm' and therefore nothing short of personal service will suffice in such a case, unless the Court has made an order for substituted service". Had the petition been a writ of summons, it would have been properly served under Order XLVI r. 3, but Bankruptcy Rule 289 makes it clear that the Civil Procedure Rules do not apply in bankruptcy save in so far as they are applied by the Bankruptcy Rules.

The present English Bankruptcy Rule 280 has no counterpart in the Straits Settlements Rules.

Mr. Aditan argued that the applicant is estopped from denying that he is a real firm. I was referred to nothing on this point save a passage in the judgment of Phillimore J. in the case to which I have already referred—"but this must not be taken to decide the case where a creditor *bona fide* believes that his debtor is a real firm, and not an individual trading as such. Questions of estoppel might then arise which would have to be decided on their merits". This is a very cautiously worded passage, and I think that if a debtor can be estopped in such a case with the result that what was bad service must be taken

to be good service, some very active misrepresentation on his part must be proved.

Bankruptcy alters status and I think that in bankruptcy even more than in an ordinary civil case a person should not be adjudicated unheard when he has not been properly served. *Re a Judgment Debtor*[(2)].

In this case there is not a scintilla of evidence of any active misrepresentation.

In an affidavit the applicant swore:—

"2. On the 24th September 1940, I moved my business of 'O. K. Varghese & Co.,' from No. 64 Serangoon Road into more spacious premises at No. 58 Serangoon Road, which the Petitioning Creditor had offered me, and which I had caused to be repaired, renovated and refitted for the purpose.

"3. Owing to my wife ailing since the birth of my second child (May 1940), I also made arrangements to take her and my two children to India. I therefore granted a Power of Attorney to my manager (T. Murugaiah) on the 3rd October 1940 (duly registered on the 4th October 1940 in the Registry of this Honourable Court as No. 497 of 1940) and after informing the Petitioning Creditor thereof and bidding him farewell, I left for India by the s.s. "Rohna" with my family on the 15th October 1940."

This affidavit was filed on 7th October 1941 after the applicant's return from India. The motion first came up for hearing on 17th October and was adjourned for a fortnight to enable the petitioning creditor to file any document he might think necessary, but no answering affidavit or other document has been filed.

In an affidavit sworn on 15th November 1940 by Seena Annavimuthu, attorney of the petitioning creditor, he said:—

"I know of my own knowledge that the said O. K. Varghese was a partner in the said firm." "I am informed by the said Murugaya and verily believe that he has a Power of Attorney in his favour duly executed by the said O. K. Varghese."

A glance at this power of attorney would have shown that it is totally inconsistent with a partnership. It begins "Know all men by these presents that I, O. K. Varghese & Company of No. 58 Serangoon Road, Singapore, Trader, hereby appoint." It goes on to refer to "the business now carried on by me"; and to authorise the attorney to collect debts "payable to me"; to settle actions pending "between me and any person"; to take out letters of administration "for my use". This power of attorney was well known to Seena Annavimuthu. He exhibited a copy of it to an affidavit sworn by him on 21st November 1940. That affidavit also exhibited two letters which I set out in full.

Singapore, 15th November, 1940.
Re O. K. Varghese & Co.
Bktcy. No. 360/40.

Dear Sir,

We are acting for the Petitioning Creditor in the above matter. A receiving Order has been made against the said O. K. Varghese & Co.

We have seen a copy of the Power of Attorney made at your office in which the said O. K. Varghese is recited as the sole proprietor of the said O. K. Varghese & Co. The said O. K. Varghese is identified by your clerks Messrs. G. M. Muthoo and B. Meiva Roy. Evidence is required as to the status of the said O. K. Varghese in the said O. K. Varghese & Co. We shall be glad if you could confirm that he was either a managing partner or sole proprietor of the firm known as O. K. Varghese & Co.

Yours faithfully,
M. Mitter, Esq. Sd. Aditan & Co.

To which Mr. Mitter replied:—

Singapore, 18th November, 1940.
Re O. K. Varghese & Co.
Bktcy. No. 360/40.

Dear Sirs,

I am in receipt of your letter dated the 15th inst.

I confirm according to the record in my office that the said O. K. Varghese was the sole proprietor of O. K. Varghese & Co.

Messrs. Aditan & Co., Yours faithfully,
Singapore. Sd. M. Mitter.

I do not believe that the petitioning creditor believed O. K. Varghese & Co. to be a partnership, and if he did, the slightest inquiry made before serving the petition would have shown that it was not a partnership.

Notwithstanding the knowledge that he admits that he had on 21st November he proceeded on 29th November to have "O. K. Varghese (a member of the firm of O. K. Varghese & Co.)" adjudged bankrupt.

The applicant is not estopped from asserting that he is the sole proprietor of O. K. Varghese & Co.

He was not served with the bankruptcy petition, and all proceedings subsequent to the issue of the bankruptcy petition are nullities.

As the other grounds in the motion (including an allegation that there was no act of bankruptcy)

were not argued, as I confined the hearing in the first place to the point as to whether the petition had been served, I do not now set aside the bankruptcy petition, but I make an order in the remaining terms of the motion.

It is still open to the applicant, should it be deemed necessary, to apply to have the petition set aside.

The petitioning creditor will pay to the applicant the taxed costs of the motion.

Order accordingly.

Re CONTRABAND MAILS ex M. V. "CONTE ROSSO."

[Orig. Civil Juris. (McElwaine, C.J.) Sept. 26, 1941]

Reprisals Order in Council of 27th November 1939—Personal property of German Ambassador.

The moveable property of the German Ambassador to Russia (a neutral state) seized during a time of war between the British Empire and Germany is enemy property and will be condemned as contraband.

Cases referred to—.

(1) *Porter v. Freudenberg* (1915) 1 K.B. 857.

(2) *Schaffenius v. Goldberg* (1916) 1 K.B. 284.

(3) *The Alwaki* (1940) P. 215.

(4) *Chung Chi Cheung v. King* (1939) M.L.J. 1.

C. H. Butterfield Crown Counsel for the Crown.

The facts and arguments appear sufficiently from the judgment.

Cur. adv. vult.

McElwaine, C.J.—In this case the Crown sought an order for the condemnation of certain mail as contraband, or in the alternative that the proceeds of the sale of the goods set out in the schedule to the Writ, being goods of enemy origin or being enemy property on board the M.V. "Conte Rosso", which sailed from a port other than an enemy port after the 4th December 1939, be retained in Court.

The Conte Rosso was on a voyage from Shanghai to Brindisi.

At the hearing I made an order in terms of the alternative prayer as to all the parcels except five as to which I reserved my decision. The five parcels were parcels of cigars of a declared value of $2,100 Shanghai currency, sent from Shanghai addressed to the German Ambassador Graf von der Schulenburg, Moscow. These parcels were detained in Singapore on the 21st May 1940 and were seized on the 31st of that month. The Writ was issued on 11th and was served on 15th June 1940.

The application is based on the Reprisals Order in Council of the 27th November 1939.

They are the property of the person who was the German Ambassador at Moscow which was at all material times the capital of a neutral State. There is no question but that the German Ambassador was and is an enemy national.

But are goods the property of an enemy national living in a neutral country which was not at the time occupied by Germany 'enemy property'?

Article 6 of the Order in Council defines goods which are enemy property as including goods belonging to any person in any territory under enemy occupation or control. Mr. Butterfield argued that this definition is not exhaustive, and usually definitions which define a thing as 'including' are not regarded as exhaustive.

These cigars I must regard as the personal property of the Ambassador; they have not been shown to have been purchased out of an entertainment allowance provided by the German Government.

I think Enemy property means property owned by an enemy and that the Reprisals Order in Council is not concerned with the destination of the property, unless perhaps if that destination were within the British Empire.

The purpose of the Order is "for restricting further the commerce of Germany". What may be detained under Article 2 of the Order is goods which are enemy property found in a ship which sailed from a port other than an enemy port after the 4th December 1939.

Article 6 does not define "enemy property"; it extends the ordinary meaning of the words. Just as for the purposes of litigation an Englishman or a neutral who is in Germany or in German occupied territory is regarded as an alien enemy, and a German